



U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

Public Copy

File: WAC 98 137 50561 Office: California Service Center Date:

JAN 18 2001

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

Identifying data covered to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, the operator of a retail restaurant, seeks authorization to employ the beneficiary temporarily in the United States as president of its new office. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel argues that the Service Center has applied an incorrect standard to this petition.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

- (ii) Evidence that the alien will be employed in an executive, a managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States.

8 C.F.R. 214.2 (1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

A) Sufficient physical premises to house the new office have been secured;

B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The record indicates that the beneficiary entered the United States on November 20, 1997 as a B-2 visa visitor for pleasure. The U.S. petitioner states that it was established in 1997 and that it is an affiliate of [REDACTED] located in [REDACTED] Republic of Korea. The petitioner declares that it is a start-up operation. It seeks authorization to employ the beneficiary for one year at a weekly salary of \$500.

At issue in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner describes the beneficiary's duties with the foreign entity as follows:

[The beneficiary] has been employed in management from [redacted] company in [redacted] Korea since its formal registration in November of 1994. She has been the Vice President and a general manager of [redacted] of Korea, and remains in that capacity pending her formal relocation and official transfer to the United States as the Executive of the USA operation. For the past three years in [redacted] her duties have included management and employment of workers in [redacted], establishment of company policies, purchasing of merchandise, marketing and develop the retail business here.

The director noted in her decision that the beneficiary would be in charge of a fast food restaurant and as such would not be managing a staff of managers and/or executive employees.

On appeal, the petitioner describes the job duties of the employees of the U.S. entity as follows:

PRESIDENT: [redacted]

The president's duties are fully described in our prior L-1A application and supporting letters. The role of [redacted] will be to direct and develop the enterprise, continue with direction of management and to make decisions for the business here as our chief executive.

MANAGER: [redacted]

[redacted] is the manager who oversees the operations on a first hand basis. He interviews, hires and makes other personnel changes at the location. He directs the food preparation services including estimates food consumption, places orders with suppliers, schedules delivery of orders, checks the contents of delivery, meets with representatives of suppliers, directs the internal operations, monitors cash control procedures, provides banking and accounting services, and performs all functions per the description at DOT 185.137 per the attached information. I-9 attached.

WORKING FOREMAN: [redacted]

[redacted] performs as the front-line supervisor over operations under the direction of the manager. He assists the manager in the following duties: participates in interviews, to hire or make other personnel changes at the location. He assist in the direction the food preparation services including estimates food consumption, places orders with suppliers, schedules delivery of orders, checks the content of deliveries, meets with representatives of suppliers, directs the internal operations, monitors

cash control procedures, provides banking and accounting services, and performs supporting work for all functions per the description at DOT 185.137 per the attached information. I-9 attached.

CHIEF COOK: [REDACTED]

[REDACTED] is the front-line supervisor above all workers in the kitchen and food preparation areas. He is directed by the manager and in some aspects, by the working foreman. He prepares a limited selection of menu items in fast-food operations. He cooks and packages batches of food such as hamburgers, fried foods, and other items which are prepared and kept warm until sale or service at our location. He performs other customary duties as the chief cook per the description at DOT 311.674-014 per the attached information. I-9 attached.

SECOND COOK: [REDACTED]

[REDACTED] assists the chief cook in all of his duties and also performs as the duties as the chief cook when [REDACTED] is not on the job. He also works to cook and packages and batches of food such as hamburgers, fried foods, and other items which are prepared and kept warm until sale or service at our location. He performs other customary duties as the second cook per the description at DOT 311.674-014 per the attached information. I-9 attached.

COOK HELPER: [REDACTED]

[REDACTED] assists the second cook and the chief cook in all of his duties and also performs as the duties as the second cook when [REDACTED] is not on the job. He also works to cook and packages and batches of food such as hamburgers, fried foods, and other items which are prepared and kept warm until sales or service at our location. He performs other customary duties as the cook helper cook per the description at DOT 311.674-014 per the attached information. I-9 attached.

COOK HELPER: [REDACTED]

[REDACTED] assists the second cook and the chief cook on all of his duties and also performs as the duties of the second cook when [REDACTED] is not on the job. He also works to cook and packages and batches of food such as hamburgers, fried foods, and other items which are prepared and kept warm until sale or service at our location. He performs other customary duties as

the cook helper per the description at DOT 311.674-014 per the attached information. I-9 attached.

PROVIDER: [REDACTED]

[REDACTED] assists the second cook, chief cook and both cook helpers in all of their duties and also performs cleaning, packaging, and internal maintenance work. He also may work to support the cooking of food such as hamburgers, fried foods, and other items which are prepared and kept warm until sale or service at our location. He performs other customary duties as the other kitchen workers per the description at DOT 311.674-014 per the attached information. I-9 attached.

CASHIER: [REDACTED]

[REDACTED] is responsible for customary services as a cashier to take orders from customers, secure the ordered beverage, serve them to the customer and accept payment. She works primarily under the direction of the working foreman, [REDACTED]. Her duties include these described at DOT 310.137-010 per the attached information. I-9 attached.

CASHIER: [REDACTED]

[REDACTED] is responsible for customary services as a cashier to take orders from customers, secure the ordered beverage, serve them to the customer and accept payment. She works primarily under the direction of the working foreman, [REDACTED]. Her duties include these described at DOT 310.137-010 per the attached information. I-9 attached.

Counsel further argues that:

We have achieved more than our goal and now employee (sic) 10 American workers in our business. We do not intend to stop here. Our long term goals are to expand upon our fast food business with either additional locations, or to add another retail business. These would also fall under the executive direction of [the beneficiary], our executive.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as directing and developing the enterprise and making decisions for the business are without any context in which to reach a determination as to whether they would be qualifying. The use of the position title of "president" is not sufficient.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title.

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties.

Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.